Supreme Court, U.S.
FILED
MAR 3 1993
OFFICE OF THE CLERK

No. 92-479

In The

Supreme Court of the United States

October Term, 1992

TXO PRODUCTION CORPORATION,

Petitioner,

vs.

ALLIANCE RESOURCES CORPORATION, TUG FORK LAND COMPANY, GEORGE KING, AND GROVER GOODE,

Respondents.

On Writ Of Certiorari To The Supreme Court Of West Virginia

BRIEF OF TRIAL LAWYERS FOR PUBLIC JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ARTHUR H. BRYANT
ANNE W. BLOOM
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
1625 Massachusetts Ave., N.W.
Suite 100
Washington, D.C. 20036
202/797-8600

JANICE ROBINSON
BRENT ROSENTHAL
(Counsel of Record)
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75219-4281
214/521-3605

Attorneys for Trial Lawyers for Public Justice

March 3, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

THIS COURT SHOULD NOT ESTABLISH A NEW SUBSTANTIVE DUE PROCESS RIGHT LIMITING PUNITIVE DAMAGES TO AN ARBITRARY MULTIPLE OF COMPENSATORY DAMAGES 4

A. The Relationship Between The Punitive Damage Award And The Compensatory Damage Award Does Not Reflect Whether The Punitive Damage Award Is Appropriate In A Particular Case 6

B. Limiting Punitive Awards To An Arbitrary Multiple Of Compensatory Awards Will Thwart The Purposes Underlying Punitive Damages 9

1. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Limit The Ability To Tailor An Award To Fit A Defendant's Particular Conduct 12

2. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Often Result In Punitive Awards That Are Smaller Or Greater Than Necessary To Deter Future Tortious Conduct ... 14

TABLE OF CONTENTS – Continued

Page

a. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Would Not Serve To Punish Or Deter Similar Conduct In Many Cases Where Compensatory Damages Are Small 15

b. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Would Not Serve To Deter Future Wrongful Conduct Where Previous Smaller Punitive Awards Had Been Insufficient To Induce A Defendant To Cease Its Tortious Conduct 19

3. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Provide Industry With Little Incentive To Recall Dangerous Products Or To Provide Appropriate Warnings In A Timely Fashion 21

4. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Would Eliminate An Important Incentive For Private Prosecution Of Outrageous Misconduct 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 11

Bell v. Wolfish, 441 U.S. 520 (1979) 11

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc., 492 U.S. 257, 279 (1989) 2, 4

Burke v. Deere & Co., 780 F.Supp. 1225 (S.D.Iowa 1991) 28

Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Company, 515 F.Supp. 64 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (1981) 8, 13, 24

D.C. Transit System v. Brooks, 287 A.2d 251 (Md. 1972) 8

Eichenseer v. Reserve Life Insurance Co., 934 F.2d 1377 (5th Cir. 1991) 20

Hawkins v. Allstate Insurance Co., 733 P.2d 1073, *cert. denied*, 484 U.S. 874 (Ariz. 1987) 17, 18

Hospital Authority of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991), *cert. denied*, 112 S.Ct. 1175 (1992) 8, 16

Knetsch v. United States, 364 U.S. 361 (1960) 11

Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1976) 8

Leimgruber v. Claridge Associates Limited, 375 A.2d 652 (N.J. 1977) 8

Leonen v. Johns-Manville Corp., 717 F.Supp. 272 (D.N.J. 1989) 23, 28

TABLE OF AUTHORITIES – Continued

Page

Moore v. American United Life Insurance Co., 197 Cal.Rptr. 878 (Cal.Ct.App. 1984) 27

Owen-Illinois, Inc. v. Bolyard, 113 S.Ct. 462 (1992) (No. 92-360) 11

Pacific Mutual Life Insurance Company v. Haslip, 111 S.Ct. 1032 (1991) 4, 11, 20

Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) .10, 24

Pezzano v. Bonneau, 329 A.2d 659 (Vt. 1974) 18

Robertson Oil Co., Inc. v. Phillips Petroleum Co., 779 F.Supp 994 (W.D.Ark. 1991) 13

Ryan v. Arneson, 422 N.W.2d 491, 496 (Iowa 1988) 4

Star Credit Corporation v. Ingram, 347 N.Y.S.2d 651 (N.Y. Civ.Ct. 1973) 27

Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987) .19, 28

Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) .. 13, 23, 25

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 11

Walker v. Sheldon, 179 N.E.2d 497 (N.Y. 1961) 23

MISCELLANEOUS

Borowsky, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S. F.L. Rev. 147, 154 (1983) 7

Childres, *Remedies, 1965 Ann. Survey of American Law* 289, 291 15

TABLE OF AUTHORITIES – Continued

Page

Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 Iowa L. Rev. 1003, 1059 (1981) 7, 10, 26

K. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 18.06 (1985) 7

Mallor & Roberts, *Punitive Damages: Toward A Principled Approach*, 31 Hastings L.J. 639, 666-67 (1980) 7, 10

Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1180 (1931) 7, 10, 15, 27

Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1316-17 (1976) 12

Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957) 12, 15

Note, *Punitive Damages and The Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L.J. 823, 841-42 (1961) 7, 22, 25

INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice, P.C. ("TLPJ"), is a national public interest law firm devoted to representing victims of corporate and government abuse. TLPJ has pioneered cases in environmental protection, civil liberties, consumer safety and employee protection. Supported by more than 1,300 trial lawyers throughout the United States, TLPJ is the only public interest law firm in the nation dedicated to using plaintiffs' tort law and trial law for the public good.

TLPJ strives to achieve social change and vindicate individual rights by ensuring that wrongdoers are punished for their misconduct. Most emphatically, punitive damages are a vital weapon in TLPJ's campaign for justice. Accordingly, TLPJ respectfully submits this brief in support of respondents in this case.[1]

SUMMARY OF ARGUMENT

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 1041-42 (1992), this Court recognized the integral role played by punitive damages in the law of torts to accomplish the laudatory purposes of punishment and deterrence. In approving the constitutionality of Alabama's system of post-verdict review of punitive awards, the Court observed that the Alabama system "ensures that punitive damages are not grossly out of proportion

[1] Pursuant to Rule 37 of the Rules of this Court, TLPJ has obtained the consent of the parties to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

to the severity of the offense and have some understandable relationship to compensatory damages." 111 S.Ct. at 1045. TXO's Amici have now seized upon this *dicta* and claim that it somehow requires creation of a substantive due process right that limits punitive damages in every case to an arbitrary multiple of compensatory damages. Not only does this suggestion fly in the face of this Court's refusal in 1989 to impose an arbitrary limit on punitive damages, *see Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), but such a rule, if adopted, would often defeat the salutary goals of punitive damages – deterrence and retribution – in many cases.

Even those states which have, as a matter of common law, required punitive damage awards to bear a "reasonable relationship" to compensatory damage awards have found implementation of the requirement problematic at best. Experience has demonstrated that, in reality, what is appropriate to compensate the victim frequently bears no relationship to what is appropriate to punish and deter the wrongdoer, much less to deter other potential wrongdoers similarly situated. Accordingly, it makes little sense for this Court to establish any new substantive due process right requiring punitive awards to bear any specific relationship to compensatory damages – and even less sense to create such a right limiting punitive awards to a specific multiple of compensatory awards.

Generally speaking, the factors relevant to determining the amount appropriate to punish and deter are the degree of reprehensibility of the defendant's conduct, the profitability of the conduct, the severity of the threatened harm, and the financial position of the defendant. When these factors are subsumed into a rule limiting punitive

awards to a multiple of compensatory damages, or any other arbitrary relationship, the purposes underlying punitive damages will not be served. Such a limitation will prevent juries and courts from tailoring punitive awards to fit a defendant's particular conduct. Further, the limitation will often result in punitive awards that are smaller than necessary to deter future tortious conduct. This is of particular concern in cases where a defendant's malicious conduct causes a small degree of harm to a great number of people, as in insurance bad faith and consumer fraud cases.

A limitation on punitive damages also will reduce the present ability of tort cases to deter wrongful conduct where the defendant has been required to pay modest punitive damages for the same conduct in the past, but has nonetheless continued such conduct. The proposed limitation on punitive awards would be especially detrimental in the products liability context because it would allow manufacturers to calculate their maximum liability in advance, and to incorporate punitive damages as another item in the cost of doing business. Finally, the limitation of punitive damages to an arbitrary multiple of compensatory damages would eliminate an important incentive for individual plaintiffs to pursue their claims against tortfeasors who have engaged in outrageous conduct, thereby ensuring that many claims, particularly smaller claims involving private consumers, will be unredressed by the courts. In such an event, our entire society will bear the brunt of the misconduct of tortfeasors unrestrained by moral conscience or by effective punitive damages.

ARGUMENT

THIS COURT SHOULD NOT ESTABLISH A NEW SUBSTANTIVE DUE PROCESS RIGHT LIMITING PUNITIVE DAMAGES TO AN ARBITRARY MULTIPLE OF COMPENSATORY DAMAGES.

This Court recognized in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991), that, for two hundred years, punitive damages have been employed as part of state tort law to accomplish the laudatory purposes of punishment and deterrence of tortfeasors. 111 S.Ct. at 1041-42. As the Court explained, the jury has traditionally determined the amount of a punitive award in light of instructions to "consider the gravity of the wrong and the need to deter similar wrongful conduct." *Id.* at 1042. While this common law process necessarily invests the jury with considerable discretion, that discretion is not unfettered. Historically, both the trial and appellate courts review any punitive award to "ensure that it is reasonable." *Id.*

In reviewing the reasonableness of a jury's punitive award, some courts have considered, as one of several factors, whether the award bears a reasonable relationship to the compensatory award. *See, e.g., Ryan v. Arneson*, 422 N.W.2d 491, 496 (Iowa 1988). This Court, while mindful of that fact, has previously refused as a matter of constitutional law, to "craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages. . . . " *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989). The Court has, however, in recently approving the constitutionality of Alabama's system for post-verdict review of punitive awards, observed that the Alabama system "ensures that punitive

damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S.Ct. at 1045.

TXO's Amici[2] now seek to parlay that language into a substantive due process right to limit punitive damages in every case to some arbitrary multiple of compensatory damages. Yet even those states with a common law requirement that punitive damages bear a reasonable relationship to compensatory damages have found it problematic. Because the amount appropriate to punish and deter has no necessary relationship with the amount of compensatory damages, the "reasonable relationship" rule has often been applied arbitrarily, or ignored entirely, rendering that rule completely meaningless. To suggest that the Constitution now requires this Court to adopt such a rule or go further and mandate the robotic application of a rule that would limit punitive awards in every case to an arbitrary multiple of compensatory damages would, in many cases, defeat the very purposes underlying punitive damages – deterrence and retribution.

---

[2] Interestingly, it is not petitioner TXO but TXO's Amici who urge upon the Court the adoption of an arbitrary ratio between punitive and compensatory damages as part of a newly created substantive due process right.

A. The Relationship Between The Punitive Damage Award And The Compensatory Damage Award Does Not Reflect Whether The Punitive Damage Award Is Appropriate In A Particular Case.

While it is true that this Court voiced concern in *Haslip* with the relative size of the jury's compensatory and punitive awards, 111 S.Ct. at 1046, this Court in no way suggested that such concern would give rise to a substantive due process right to curtailment of a punitive award to an arbitrary multiple of its corresponding compensatory award. To the contrary, the Court specifically held: "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." 111 S.Ct. at 1043. While we agree that the bright line standard now urged by TXO's Amici "cannot" be adopted by the Court, we would further suggest that the seemingly more benign standard requiring a reasonable relationship between punitive and compensatory damages is also one that should not be employed as an element of substantive due process in reviewing a punitive award. In fact, even the common law use of this standard, often referred to as the "reasonable relationship" or the "ratio" rule, has been rejected by the vast majority of courts and commentators to consider it. To the extent this Court mentioned the rule in *Haslip*, that discussion was *dicta*. The reference certainly provides no basis for creation of a due process right to the limitation of punitive damages to an arbitrary multiple of compensatory damages.

The commentators have criticized the "reasonable relationship" rule, arguing that, since no fixed ratio can

be mechanically applied in every case, it is impossible to know what relationship is "reasonable" merely by comparing the size of the compensatory and punitive awards. *See, e.g.*, K. Ghiardi & J. Kircher, *Punitive Damages: Law and Practice* § 18.06 (1985); Borowsky, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F.L.Rev. 147, 154 (1983); Mallor & Roberts, *Punitive Damages: Toward A Principled Approach*, 31 Hastings L.J. 639, 666-67 (1980); Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1180 (1931); and Ellis, *Punitive Damages in Iowa Law: A Critical Assessment*, 66 Iowa L.Rev. 1003, 1059 (1981). Further, because there is no relationship in reality between the amount necessary to compensate the victim and the amount necessary to punish and deter wrongdoers, the rule has been inconsistently applied in practice, so that "[j]udgments in which the punitive damage verdicts have hardly exceeded the actual damages have been reversed as excessive and judgments allowing punitive damages many times as great as the actual damages have been affirmed." Morris, 44 Harv.L.Rev. at 1180; Borowsky, 17 U.S.F.L.Rev. at 164. Given the limited usefulness of the "reasonable relationship" standard, and the inconsistency with which it has been applied by the courts, it has been generally recognized by commentators that the rule is in fact, "probably more often a rationalization of results than a means of obtaining them." Morris, 44 Harv.L.Rev. at 1180. *See also* K. Ghiardi & J. Kircher, at § 18.06; Ellis, 66 Iowa L.Rev. at 1060; Borowsky, 17 U.S.F.L.Rev. at 164; and Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration*, 9 Pac.L.J. 823, 846 (1978).

The courts have been no less critical. Indeed, as explained by one court, the standard is unnecessary even as a tool of rationalization:

> It is probable that the real purpose served by the "ratio" rule is to remind the reviewing courts of their power to overturn excessive damage awards. . . . But the "ratio" rule is not needed for this purpose since the appellate court is always free to determine that the punitive award is excessive, based on factors in addition to the scope of compensatory damage.

Leimgruber v. Claridge Associates Ltd., 375 A.2d 652, 657 (N.J. 1977). Similarly, the Florida Supreme Court, in rejecting the reasonable relationship requirement, criticized the rule as one conceived to be used as a "rule of thumb" in reviewing awards of punitive damages, but that is now employed "in some jurisdictions, [as] an inflexible rule of law that translates into the application of strict mathematical formula." *Lassitter v. International Union of Operating Engineers*, 349 So.2d 622, 626 (Fla. 1976). *See also Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d 501, 502-03 (Ga. 1991), *cert. denied*, 112 S.Ct. 1175 (1992); *D.C. Transit System v. Brooks*, 287 A.2d 251, 257 (Md. 1972); and *Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co.*, 515 F.Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (1981). Undaunted in the face of this common law rejection of an essentially useless and arbitrary tool for reviewing the propriety of punitive awards, TXO's Amici ask the Court to go one step further and rule that the Constitution requires an even more arbitrary limitation on punitive damages. The Court should decline this invitation.

B. Limiting Punitive Awards To An Arbitrary Multiple Of Compensatory Awards Will Thwart The Purposes Underlying Punitive Damages.

We do not suggest that the discretion of the jury in making a punitive award should be boundless. Rather, we caution that the mechanical imposition of a simplistic, mathematical formula will necessarily thwart the purposes underlying punitive damages – punishment and deterrence. When tortfeasors are not punished for their past conduct or deterred from repeating such offenses in the future, it is society as a whole and not simply unlucky individuals who will suffer.

As this Court noted in *Haslip*, a jury's award of punitive damages must be tailored to advance the goals of "deterrence and retribution . . . ." 111 S.Ct. at 1044. In determining a dollar amount that will accomplish these goals, a jury (or a reviewing court) may be guided by several considerations. The fortuity of the particular harm suffered by any particular plaintiff, however, is perhaps the least relevant consideration to the issues of punishment and deterrence:

> The actual harm that occurred is at best a crude measure of the moral egregiousness of a defendant's conduct, and hence, of the punishment deserved. If degrees of egregiousness were ranked along a scale ranging from accidental "acts of God" through negligence to deliberately injurious acts, one would not expect to find any correlation between egregiousness and the gravity of the injury sustained by an individual plaintiff. Death, disabling physical injury, or substantial economic loss may result from acts that fall at any point on the egregiousness scale.

> The same is true for a minor physical or psychic injury and petty economic loss.

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L.Rev. 1, 58 (1982). Similarly, as explained by Clarence Morris in his seminal article published over sixty years ago: "The history of the defendant only indicates whether it is desirable to admonish him; and his act in its setting – rather than the concatenation of events which *happens to follow* his act – is alone important in determining whether his conduct should be condemned." Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1181 (1931) (emphasis in original).

That this single factor is not particularly helpful in determining whether an award of punitive damages is rationally related to society's goals of deterrence and retribution does not mean that a court is without guidance on this question. It has been explained that "[t]he abandonment of the reasonable relationship rule would not mean that the assessment of punitive damages would be thrown to the gods. Rather, courts would be forced to balance society's interest against the defendant's interests." Mallor & Roberts, 31 Hastings L.J. at 667. Factors relevant to this inquiry include: the severity of the threatened harm, the degree of reprehensibility of the defendant's conduct, the profitability of the conduct, and the financial position of the defendant. *See, e.g., Palmer v. A.H. Robins Co.*, 684 P.2d 187, 220 (Colo. 1984).[3] It is only

[3] While the Court in *Haslip* discussed other factors in addition to these to be considered in Alabama's system of post-verdict review of punitive damages, 111 S.Ct. at 1045, the Court's opinion did not suggest that due process requires every state to include in its post-verdict review procedures a consideration of each of the factors included in the Alabama system. Indeed, we would suggest that some of the factors

through a careful consideration of these factors that an award of punitive damages can "be tailored to teach the lesson soundly" that the defendant's conduct will not be

considered under Alabama's system, including the existence of other civil awards against the defendant for the same conduct, are not relevant, much less constitutionally required for a review of punitive damages awards that comports with due process.

This case involves a single assessment of punitive damages on a record found by the state appellate court to be sufficient to support a sizable award against a party that engaged in fraudulent action intentionally undertaken. Nothing in the West Virginia court's opinion or in the brief of petitioner suggests that this case raises an issue about so-called multiple punitive damage awards, that is, successive punitive damage awards assessed against a mass producer of defective products that cause injury to numerous individuals. Nonetheless, three briefs of Amici Curiae, namely, the brief of Owens-Illinois, Inc. and Texaco, Inc., the brief for the Center for Claims Resolution and the brief of Continental Casualty Company, seek to have this Court decide in this case questions concerning multiple punitive damage awards in asbestos cases.

This Court should not, of course, decide an issue that is raised not by the parties to this petition but arises only in the briefs of Amici Curiae. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) (*citing Bell v. Wolfish*, 441 U.S. 520, 532 n.13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1960)). Further, there is no factual record in this case from which this Court can make any sort of judgment about multiple punitive damages. Thus, given the fact that this Court has several times declined review of the issue, most recently in 1992 (*see Owens-Illinois v. Bolyard*, 113 S.Ct. 462 (1992) (No. 92-360)), this case would seem a particularly inappropriate time for resolution of the question. Finally, principles of comity require that this Court should refrain from deciding an issue of traditional state tort law before the highest court of the state has an opportunity to review it. *See generally Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 285-86 (1970). Issues concerning punitive damages are such a part of traditional state tort law. *See Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, 1041 (1991).

tolerated. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich.L.Rev. 1258, 1316-17 (1976).

When these factors are ignored in favor of a simplistic rule that requires punitive awards to bear an arbitrary relation to compensatory damages, punitive awards will necessarily be limited by a single factor "unrelated to the primary reasons [punitive] damages are assessed against the defendant." *Id.* at 1317 n.291. Such a limited (and irrelevant) inquiry will undoubtedly thwart the purposes underlying punitive damages: punishment and deterrence. "A more desirable indication of the scope of the use of punitive damages should be framed in terms of the needs and efficacy of admonition, so that the doctrine could be used in the education of blunderers as well as for the discouragement of rogues." Morris, 44 Harv. L. Rev. at 1191.

1. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Limit The Ability To Tailor An Award To Fit A Defendant's Particular Conduct.

This Court in *Haslip* recognized the state's "interest in meaningful individualized assessment of appropriate deterrence and retribution." 111 S.Ct. at 1044. Indeed, the vital importance of punitive damages to the tort system stems in large part from the fact that punitive damages allow "additional flexibility for admonition, so that the punishment may be roughly adjusted to the offender." Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 524 (1957).

To impose a mathematical formula in lieu of the jury's guided discretion is to deprive the states of the

ability to impose "meaningful individualized assessment" of punitive damages. This is a step that many courts have refused to take. *See Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) (flexibility of punitive damages "can ensure a sufficient award in the case of a rich defendant and avoid an overburdensome one where the defendant is not as wealthy"); and *Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co.*, 515 F.Supp. 64, 106 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981) (refusal to require ratio between punitive and compensatory damages "due to the need to individualize punitive damage verdicts"). Similarly, when reviewing an eight million dollar punitive award in light of this Court's ruling in *Haslip*, one court cautioned against trading away the value of individualized judgment in each case for the ease of mechanical computation of punitive awards:

> Finally, it needs to be said that despite the moral skepticism of our age, its fascination with utilitarianism, and its tendency to apotheosize the work of the counting sciences, judging still requires judgment. Using judgment is not, as Holmes remarked in another context, a duty; it is merely a necessity. That there is some risk inherent in the enterprise does not distinguish it from any other human undertaking and cannot excuse a refusal to engage in it.

Robertson Oil Co., Inc. v. Phillips Petroleum Co., 779 F.Supp. 994, 997 (W.D.Ark. 1991). The federal court's "judgment" in *Robertson Oil* was entirely consistent with this Court's recognition in *Haslip* that "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied." 111 S.Ct. at 1044.

2. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Often Result In Punitive Awards That Are Smaller Or Greater Than Necessary To Deter Future Tortious Conduct.

The suggestion that punitive damages must bear a "reasonable relationship" to compensatory damages or that punitive damages should be limited to an arbitrary multiple of compensatory damages has been attacked most pointedly because such requirements would so often lead to punitive awards that are inappropriately small or large[4] under the particular facts of a given case. The criticism is not new; indeed, it was recognized over sixty years ago:

> The misleading character of the ratio test is emphasized when it is remembered that the "compensatory" damages are usually admonitory as well as reparative. When an act with a vicious tendency happens to result in a small injury the "compensatory" damages are necessarily small. If it must follow that the punitive damages must also be small, the total verdict might be lenient where severity is desirable. On the other hand, if the "compensatory" damages are large, the defendant is severely admonished without the addition of any punitive damages; but in such a case the ratio test counsels large

[4] As discussed in the Brief of Amicus Curiae Arthur Anderson & Co., Coopers & Lybrand, DeLoitte & Touche, Ernst & Young, KPMG Peat Marwick and Price Waterhouse, the requirement of an arbitrary ratio between punitive and compensatory damages may actually lead to excessive punitive awards where very large compensatory awards already provide sufficient punishment and deterrence. Because this facet of the issue is ably explored by TXO's Amici, the topic is not revisited here.

> punitive damages, and may result in over-severity entirely unnecessary for the proper working of the admonitory function. So the ratio test seems to be an impediment in many cases, rather than a good legal tool.

Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182 (1931). The observation is as true today as it was in 1931: the imposition of a "reasonable relationship" between punitive and compensatory damages or the limitation of punitive damages to an arbitrary multiple of compensatory damages will result in punitive awards that are not rationally related to the goals of retribution and deterrence.

a. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Would Not Serve To Punish Or Deter Similar Conduct In Many Cases Where Compensatory Damages Are Small.

In many instances where a defendant's tortious conduct, though malicious, causes only a small degree of harm to a particular plaintiff, a punitive damage award that is restricted by the size of the compensatory award will not serve to deter future wrongful conduct by the defendant or others similarly situated:

> Indeed, the nominal-damages cases are peculiarly appropriate for exemplary damages. If no compensable harm is done even though the defendant's conduct is very wrongful, the normal admonitory function of tort law is not brought into play unless exemplary damages are assessed.

Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 529 (1957). *See also* Childres, *Remedies, 1965 Ann.*

Survey of American Law 289, 291 ("If punitive damages have a core function, it exists in the case in which compensatory damages are nominal or small").

This principle has not gone unnoticed by the courts. In affirming an award of $1.3 million in punitive damages and $5,001 in compensatory damages in a case in which a burn victim was slightly injured in a helicopter crash that occurred as the defendant hospital was transferring the victim to a burn unit in one of its own hospitals, rather than a similar unit in another, closer hospital, the Georgia Supreme Court noted that although the plaintiff's injuries had been slight, the substantial punitive award was nonetheless appropriate to deter similar conduct in future cases, given the risk of serious harm to other patients if not taken to the closest medical facility for treatment of their injuries:

> This award, therefore, is consistent both with the nature of the authority's conduct and the potential ensuing injuries. Surely the process is not rendered unconstitutional by permitting the deterrence of potentially dangerous conduct at a point in time when the injury is slight and when only nominal damages may be involved. Society's interest would seem better served by deterring objectionable conduct at the first opportunity so that the potentially greater injury which might otherwise be caused by such conduct might be avoided.

Hospital Authority of Gwinnett County v. Jones, 409 S.E.2d 501, 503 (Ga. 1991), *cert. denied*, 112 S.Ct. 1175 (1992).

The importance of substantial punitive awards in deterring future wrongful conduct where such conduct, though outrageous, results in only limited compensatory damages is highlighted vividly by examining other cases

in which substantial punitive awards have been imposed. For example, in *Hawkins v. Allstate Insurance Co.*, 733 P.2d 1073, *cert. denied*, 484 U.S. 874 (1987), the insured brought a fraud and bad faith action against its automobile insurer when the insurer delayed and ultimately refused to replace the insured's demolished car with one of "like kind and quality" in accordance with the terms of the policy. 733 P.2d at 1076. Although the insurer did finally replace the plaintiff's vehicle, the replacement car was not similarly equipped and Allstate refused to make adjustments for the difference in "blue book" values between the two cars, which amounted to $161.45. Thus, the plaintiff's actual damages were relatively small.

The plaintiff presented evidence at trial that the insurer had engaged in deceptive claims practices for up to eighteen years, by which practices the insurer shaved relatively small amounts from each insured's total loss claim filed. 733 P.2d at 1085. In particular, the insurer routinely deducted a $35.00 cleaning fee even though automobiles that had been completely demolished were not in fact cleaned. 733 P.2d at 1078. The insurer instructed its claims representatives to make such deductions under the theory that "if you could save one dollar on a million claims, you would save the company as much as a million dollars." *Id.* At the conclusion of the evidence, the jury awarded the plaintiff $15,000 in compensatory damages and $3.5 million in punitive damages. 733 P.2d at 1077.

On appeal, the Arizona Supreme Court considered the jury's award in light of a number of factors, including the nature of the defendant's conduct, its reprehensibility, the severity of the harm likely to result from such conduct, the duration of the misconduct, the degree of the

defendant's awareness of the risk of harm, concealment of the misconduct, the defendant's financial position, the profitability of such conduct, and whether the defendant had engaged in a pattern of similar unfair practices. 733 P.2d at 1080-81. Based on a consideration of all those factors, the Arizona Supreme Court held that the jury did not improperly find that punitive damages in the amount of $3.5 million were appropriate to punish the insurer for its past conduct and to deter it and other insurers from continuing to engage in such fraudulent activities in the future. The *Hawkins* decision thus sent a strong and clear message not only to Allstate, but to other insurers as well, that dishonest insurance practices would not be tolerated in Arizona. This was a message the insurance industry needed to hear; yet, the signal would have been virtually inaudible had the punitive award in *Hawkins* been limited to an arbitrary multiple of three to five times the compensatory award as now urged by TXO's Amici.

Substantial punitive awards are also useful in punishing malicious conduct that results in limited harm in the isolated instance. For example, in *Pezzano v. Bonneau*, 329 A.2d 659 (1974), the plaintiff sued the defendant auto garage for conversion after the garage refused to release the plaintiff's disabled automobile as a result of a dispute over $2.00 of an alleged towing charge. 329 A.2d at 660. The garage then made totally groundless charges to the police that the plaintiff's car was stolen and that the plaintiff was dealing in drugs. Ultimately, the plaintiff was able to retrieve his car and drive it home after repair by another mechanic for the "minimal cost of $4.00." 329 A.2d at 661. The jury awarded the plaintiff $300 in compensatory damages and $7,500 in punitive damages. The court found that the jury's award was not excessive in

view of the evidence presented. *Id.* Had the punitive award in *Pezzano* been restricted to the arbitrary multiple of the compensatory award urged by TXO's Amici, however, the defendant garage would have received little more than a slap on the wrist for conduct that was not only outrageous, but likely to be repeated if unpunished.

These cases illustrate the central problem with the new substantive due process limitation urged by TXO and its Amici: it would only come into play in cases where it shouldn't. In other words, it would only prevent punitive damage awards that both the factfinder and the reviewing court found were appropriate to punish or deter under the circumstances at hand.

b. The Limitation Of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Would Not Serve To Deter Future Wrongful Conduct Where Previous Smaller Punitive Awards Had Been Insufficient to Induce A Defendant To Cease Its Tortious Conduct.

In cases involving deliberate and willful misconduct by a large institutional defendant, it is often true that only a punitive award of substance can deter the tortfeasor from similar conduct in the future. That this is true is evidenced by the fact that, in some cases where more moderate punitive awards have been imposed, defendants have continued their tortious conduct undeterred until faced with subsequent, more substantial awards.

In *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210 (Kan. 1987), the plaintiff sued the manufacturer of an intrauterine device for damages arising out of her use of the Dalkon

Shield. The jury returned a verdict in the plaintiff's favor for $1.7 million in compensatory damages and $7.5 million in punitive damages. In upholding the jury's punitive award, the Kansas Supreme Court considered a number of factors, including the fact that A. H. Robins' reaction in the face of previous punitive awards had been "less than commendable." 738 P.2d at 1246. The court noted that in 1975, a jury awarded $75,000 in punitive damages against A. H. Robins in the first Dalkon Shield case to proceed to trial. At that time, Robins did not recall its product, did not warn users of the dangers, and similarly did not warn physicians. Instead, Robins reacted by destroying documents in its possession that might implicate it in future litigation. *Id.* Given that the relatively modest punitive award of $75,000 in 1975 had had no positive impact on Robins' conduct, the Kansas court affirmed the jury's assessment that an award of $7.5 million would be better tailored to suit Robins' conduct and deter similar conduct by Robins or others in the future.

The Fifth Circuit reached a similar result in *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991). In *Eichenseer*, the plaintiff filed suit against her insurer after the insurer wrongfully denied payment of the plaintiff's medical claim. Following a bench trial, the court awarded the plaintiff $1,000 in compensatory damages and $500,000 in punitive damages. 934 F.2d at 1380. On appeal, ultimately to this Court, the case was remanded for reconsideration in light of *Pacific Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). *Id.* Upon reviewing the award in the context of the factors discussed in *Haslip*, the Fifth Circuit affirmed the district court's award of punitive damages and was particularly persuaded by the fact that in 1983, a punitive award of $150,000 had been

assessed against the same insurer on the "basis of conduct remarkably similar to the egregious conduct in the instant case." 934 F.2d at 1384. The Fifth Circuit observed:

> This $150,000 award appears to have had little effect on the manner in which Reserve Life handled claims. If a lesser and comparatively small punitive damages award does not deter wrongful conduct, then a court may reason, as a matter of common sense, that a larger award is necessary in subsequent cases. The district court concluded that, because the earlier $150,000 had little deterrent effect, it should impose a larger $500,000 punitive damages award. This conclusion finds support in the record.

934 F.2d at 1384.

These two cases graphically illustrate that willful defendants often may not be deterred from their tortious conduct unless punitive awards are substantial. Accordingly, were punitive damage awards limited in every case by some arbitrary ratio to compensatory awards, many defendants would not be deterred from continuing their wrongful conduct. It is only where punitive damages can be tailored to fit the conduct of a particular defendant that punitive awards can possibly achieve the goals of punishment and deterrence.

3. The Limitation of Punitive Damages To An Arbitrary Multiple Of Compensatory Damages Will Provide Industry With Little Incentive To Recall Dangerous Products Or To Provide Appropriate Warnings In A Timely Fashion.

Commentators and courts alike have recognized that the imposition of uncertain punitive damages is especially important in the products liability context:

"Nowhere is the potential for a result contrary to the purpose of punitive damages greater than in the area of consumer actions. This is an area in which the claim of an individual is most likely to be so small in comparison to the cost of litigation as not to warrant court action. Coupled with this is the fact that the position of the consumer does not go unnoticed by the large companies with whom he must deal." Note, *Punitive Damages and The Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L.J. 823, 841-42 (1978). Further, where a manufacturer can predict in advance its liability within limits – as where punitive damages are capped at some arbitrary multiple of compensatory damages – the manufacturer is enabled to factor this consideration into its cost-benefit analysis of marketing a defective product. Accordingly, the imposition of an arbitrary limit on punitive damages in the products liability arena has been harshly criticized: "Although a quantitative formula would be comforting, it would be undesirable. The deterrent effect of punitive damages would be minimized if a person contemplating wrongful conduct could gauge his or her maximum liability in advance." Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 666 (1980).

The underlying theme running throughout the case-law considering the issue of arbitrary limitations on punitive damages is that damages that can be fixed with any sort of precision will not deter wrongful conduct. Thus, as early as 1961, New York's highest court explained that it is the very uncertainty of punitive damages that makes them effective in deterring tortious conduct:

> In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. Sheldon, 179 N.E.2d 497, 499 (N.Y. 1961). *See also Tuttle v. Raymond*, 494 A.2d 1353, 1359 (Me. 1985) ("Flexibility is also necessary to avoid situations where the potential benefits of wrongdoing could outweigh a known maximum liability").

In the context of asbestos litigation, another court stressed that, if punitive damages are limited in a way that enables manufacturers to quantify the risk associated with their activities, they may choose simply to factor that risk as a cost of doing business, rather than remove their dangerous products from the market:

> As with compensatory damages, manufacturers will then be able to predict, within certain limits, the amount of punitive damages which may result and factor this figure into a cost-benefit analysis when deciding whether to market a particular product. . . . Rather than remove dangerous products from the market, manufacturers may instead accept the risk of paying limited punitive damages.

Leonen v. Johns-Manville Corp., 717 F.Supp. 272, 284 (D.N.J. 1989). The Colorado Supreme Court voiced similar concerns in the context of Dalkon Shield litigation:

> Indeed, one virtue of Colorado's statutory remedy of punitive damages is that, from a deterrence standpoint, the precise magnitude of cost to the offending party is impossible to project. This uncertainty of costs will undoubtedly affect

> a manufacturer's decision to introduce a product in the marketplace. If punitive damages are predictably certain, they become just another item in the cost of doing business, much like other production costs, and thereby induce a reluctance on the part of the manufacturer to sacrifice profit by removing a correctible defect.

Palmer v. A. H. Robins Co., 684 P.2d 187, 218 (Colo. 1984).

Finally, the court in *Campus Sweater & Sportswear Co. v. M.B. Kahn Construction Co.*, also recognized that it is the inability to predict with certainty the specific amount of a potential punitive award that serves to encourage manufacturers to test their products adequately in the first instance:

> Punitive damages add an "open-ended" factor to the equation which company officials must take into consideration. A manufacturer will be aware of the profitability of his product but will be unable to determine whether his potential liability will range from thousands to millions to even tens of millions of dollars. Logically, this forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective product, or an untested product. Furthermore, by absorbing many of the profits which were made from producing products with less testing and fewer safety measures, punitive damages help to prevent decisions which dilute safety measures.

515 F.Supp. at 107. If punitive damages are limited to an arbitrary multiple of compensatory damages, then, manufacturers will be able to predict their liability and thus will have little incentive to recall dangerous products or to test those products adequately in the first instance.

4. The Limitation Of Punitive Damages To An Arbitrary Multiple of Compensatory Damages Would Eliminate An Important Incentive For Private Prosecution Of Outrageous Misconduct.

Another important purpose underlying punitive damages that is not often discussed by the courts or commentators is that of offering an incentive to individual plaintiffs to pursue their claims against tortfeasors who have engaged in outrageous conduct. *See* Note, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 Pac. L. J. 823-830 (1978). The possibility of a punitive damages award encourages a plaintiff "to seek a legal remedy which he might not have otherwise pursued because of the relative insignificance of the actual damages suffered compared to the cost of litigation." Note, 9 Pac. L. J. at 830. This incentive provides a benefit not only to the individual plaintiff, however, but serves society as well by punishing and deterring undesirable conduct that escapes the reach of the criminal laws. *See id.* As one court has explained, exemplary damages offer "an incentive for private civil enforcement of society's rules against serious misconduct . . . especially when the prospective compensatory recovery is low or the expected cost of litigation is high." *Tuttle v. Raymond*, 494 A.2d at 1358-59. If punitive damages are limited to an arbitrary multiple of compensatory damages, a plaintiff who has suffered limited actual damages will have little incentive to expend the resources necessary to seek redress for his injuries through the legal process. *See* 9 Pac. L.J. at 840-41.

It has also been observed that limiting punitive damages to an arbitrary multiple of compensatory damages,

thereby deterring individuals from filing suit, will result in an allocation of legal resources that is neither fair nor efficient. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal. L. Rev. 1, 59 (1982). Professor Ellis explains that if large punitive awards can accompany only large compensatory awards, then the cost of litigating cases with potentially large compensatory awards will rise as defendants shift their resources to protect themselves in such cases. This is true even in cases where the probability of the same harm occurring to other individuals is small. Correspondingly, resources will be drained from cases where the individual loss is small, even in cases where the aggregate social loss is high, because the probability of harm to other individuals is also high. Injured victims will not bring such actions because their possible recovery – limited to punitive damages that are tied to compensatory damages – will be low. Instead, plaintiffs will only file suit in economically viable cases where compensatory damages (and punitive damages) may be very high. Ironically, these are the same lawsuits that would have been litigated even were substantial punitive damages not available. The result will be that an entire class of lawsuits will not be filed, a corresponding class of injuries will not be redressed, and the wrongful conduct producing such injuries will not be punished, or deterred.

In response to these arguments, some might cynically offer that any ruling which would result in the prosecution of fewer lawsuits would prove a benefit rather than a detriment to the nation's legal system. This overlooks, however, the fact that litigation brought to redress wrongs for which punitive damages may be awarded is almost always socially desirable. Indeed, it has long been

recognized that the cases in which punitive damages are available often involve fraud or unfair competition, and commonly present a situation in which a large institutional defendant engages in a pattern of conduct that results in relatively slight damages to a great many people, leaving the defendant assured that few people will expend the time or resources to sue, given the paltry compensatory damages that would be recoverable. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1185-87 (1931).

The desirability of encouraging such litigation is easily appreciated from a review of the type of conduct that has spawned large punitive awards in, for example, insurance bad faith litigation, *see, e.g., Hawkins v. Allstate Insurance Co.*, (imposition of $3.5 million punitive award affirmed where evidence established plaintiff damaged by insurer's practice for over eighteen years of deducting $35.00 cleaning fee from estimated value of insureds' demolished automobiles, regardless of cleanliness of cars, which practice was premised on theory that such amount would seem negligible to an individual claimant but would, when deducted from every claim filed, make an enormous sum of money for the insurer over a period of time); and *Moore v. American United Life Insurance Co.*, 197 Cal.Rptr. 878 (Cal.Ct.App. 1984) (jury award of $30,000 compensatory damages and $2.5 million punitive damages affirmed where evidence established that defendant insurer consciously engaged in practice of cheating insureds out of health benefits by obtaining incorrect opinions from treating physicians and by summarily denying insureds' claims); and in consumer fraud cases; *see, e.g., Star Credit Corporation v. Ingram*, 347 N.Y.S.2d 651

(N.Y. Civ.Ct. 1973) (court awarded full amount of punitive damages requested where evidence established that individual had been damaged by finance company that had implemented consumer fraud scheme victimizing thousands of ghetto residents over period of many years).

The possibility of the recovery of substantial punitive damages not only encourages lawsuits that help to make our society safe from fraudulent schemes consciously designed to drain our wallets; it also encourages litigation that serves to protect us from unsafe products not properly designed to prevent the loss of life and limb. As recognized by one federal court: "With respect to plaintiffs, punitive damages provide an incentive to bring suit against manufacturers who place unsafe products on the market with deliberate or reckless disregard for public safety, when a compensatory award for the harm caused would be outweighed by the skyrocketing costs of litigation." *Leonen v. Johns-Manville Corporation*, 717 F.Supp. 272, 284 (D.N.J. 1989). Again, the litigation in the products liability context that has resulted in sizable punitive awards has been directed at reprehensible conduct by manufacturers who displayed a deliberate preference for profit over public health and safety. *See, e.g., Burke v. Deere & Co.*, 780 F.Supp. 1225 (S.D.Iowa 1991) (court let stand $28 million of $50 million punitive award where evidence established combine manufacturer knew machinery was dangerous but, due to economic motivations, continued to manufacture defective machinery for over two years, and waited nearly five years to recall defective combines for retrofit with safer design, resulting in injury in 26 reported cases including the plaintiff's); and *Tetuan v. A. H. Robins Co.*, 738 P.2d 1210 (Kan.

1987) (affirming $7.5 million punitive award where evidence established plaintiff injured as a result of manufacturer's placing on market defective intrauterine device and then fraudulently concealing defects for years).

If punitive awards are limited to an arbitrary multiple of compensatory damages, plaintiffs in many cases will have no financial incentive, and indeed, will be financially unable, to seek redress for their injuries through the courts. In that event, it will be not just isolated victims, but society as a whole, which will suffer the misconduct of wrongdoers unfettered by moral or legal restraints.

CONCLUSION

The judgment of the Supreme Court of West Virginia should be affirmed.

DATE: March 3, 1993.

Respectfully submitted,

ARTHUR H. BRYANT
ANNE W. BLOOM
TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C.
1625 Massachusetts Ave., N.W.
Suite 100
Washington, D.C. 20036
202/797-8600

JANICE ROBINSON
BRENT ROSENTHAL
(Counsel of Record)
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75219-4281
214/521-3605

Attorneys for
Trial Lawyers for Public Justice, P.C.